IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 3

J. B. HUTTON, JR., INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF MRS. R. G. HUTTON; MRS. ROSALIND GWIN HUTTON JOHNSON; AND MRS. MARY HUTTON McCUTCHAN, *Petitioners*,

vs.

S. D. G. HUTTON,
Respondent.

PETITION FOR WRIT OF CERTIORARI AND SUMMARY REMAND FOR TRIAL OF DEFENSIVE ISSUES PRETERMITTED BY CHANCELLOR, OR FOR CERTIORARI AND ARGUMENT; TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

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CONTENTS

Parties, Relief Sought, and Decisions to Be Reviewed 1
Statutory Grounds of Jurisdiction 3
Questions As to Relief Sought and Due Process Presented for Review 4

I. Denial of Procedural Due Process by Refusal of Trial of Issues Pretermitted by Chancellor in Giving Decree for Petitioners 4
Right to Trial of Defenses 5
Right to Object to Exclusion and to Have Opportunity to Introduce Evidence 7

II. Denial of Substantive Due Process 7
Liberty of Contract and Property 7
Questions for Review at Length, in Detail 8

1. Veto of Condition Precedent to Negotiation 8
2. Petitioners' Right to Negotiate for Family Settlement Stopping Litigation of Frivolous Claims 8
3. Veto of Actual Payment As Condition Precedent to Creating Rights in Respondent 9
4. Arbitrary Finding of Executory Contract to Sell Land 9
5. Consistent Standards of Construction 10
6. Arbitrary Presumption 11
7. Arbitrary Finding of No Obligation of Respondent to Pay Interest and Attorney Fees 11
8. Arbitrary Finding Against Petitioners' Good Reputation 12

Constitutional Provisions and Statutes Involved in the Case 13

Statement of Procedure and Facts 15
Summary of Ultimate Facts Here Pertinent 15

I. Outline of Defensive Issues and Procedure 16
Summary of Procedure 16
First Ultimate Issue of Fact on Petition for Certiorari: Right to Trial of Defenses 17
Present Case Not One of Construction of Established Contract, but of Deciding on the Creation of a Contract 18
Issues of Fact Pleaded, Forming Bases for Legal Conclusions to Be Urged 19
1. Issues of Bill for Specific Performance 19
2. Issues of Answer Summarized 19

II. Outline of Factual Background of Present Case 22
1. Specific Pertinence of the Facts 22
2. Evidentiary and Procedural Presumption 22
3. Transaction in Issue: Petitioners' Proposed Settlement of Respondent's Economic Problem and of His Contentions with His Parents' Family, the Petitioners; and Respondent's Abandonment of Negotiations 24

III. Trial and Appellate Procedure 29
1. Chancellor's Rulings Excluding Petitioners' Proof, but Giving Decree for Petitioners on One Point 29
2. Appellate Decision, Usurping Functions of Trier of Facts *De Novo*, and Arbitrarily Denying Petitioners Liberty of Contract and Property Without Due Process of Law 30
3. Action and Decision on Notes Made by Respondent and Held As Asset of Estate 31

Stage of Proceedings at Which and Manner of Raising the Federal Question of Petitioners' Rights under

the Due Process Clause of the Fourteenth Amendment 32

Argument of Reasons for Allowing Certiorari and for Summary Remand for Trial of Pretermitted Issues under *Saunders* v. *Shaw* and *Kelley* v. *Everglades Drainage District*, or for Allowing Oral Argument 35

I. Reasons for Certiorari and Summary Remand for Trial of Pretermitted Defensive Issues of Fact 36

II. Reasons for Grant of Certiorari Exercising the Judicial Power of the Supreme Court of the United States 36

Summary 37

Detailed Argument—

Judicial Power of Supreme Court of the United States 37

Procedural Due Process 38

Saunders v. *Shaw* 38

Kelley v. *Everglades Drainage District* 39

Mississippi Chancery and Appellate Jurisdiction 40

Denial of Procedural Due Process in Present Case 41

Constitutional Question Raised Promptly by Petitioners upon First Denial of Due Process 42

Summary Remand, Authorities 44

Denial of Substantive Due Process 44

Hardship of Respondent's Actions 45

Repudiation Found Arbitrarily 45

Nullification of Note Provisions 46

General Importance of Present Case As a Precedent 46

Resumé 47

Prayer for Due Process of Law 48

Appendix A—Disposition in Court of Defensive Issues Pleaded on Which Requested and Required Findings by Chancellor Were Not Made A-1-A-24
Text of Letter for Reference in This Petition. A-24-A-25
Appendix B—Opinions of Chancellor and of State Supreme Court Italicized to Show Points Decided by Chancellor and Also Pretermission by Him of Findings on Issues of Fact Requested and to Show Findings *De Novo* by State Supreme Court in Excess of Its Authority B-1-B-25
Final Orders and Decrees under Review B-26-B-27

TABLE OF AUTHORITIES

Adair v. *United States*, 208 U.S. 161 45
Allgeyer v. *Louisiana*, 165 U.S. 578 45
Bullard v. *Citizens Nat. Bk.*, 160 So. 280 40
Consolidated Rock, etc. Co. v. *DuBois*, 312 U.S. 510 40
Constitution of Mississippi, Sec. 146 13
Constitution of United States, Art. I, Sec. 10; Art. III, Sec. 2; Art. VI, Sec. 2; Amendment XIV 14, 15
Cooley, "Torts", page 278 (Quoted in *Adair*, 208 U.S. 173) 45
Coppage v. *Kansas*, 236 U.S. 1 45
Corwin, Constitution Annotated, p. 332 (1952) 12, 46
Crowell v. *Randell*, 35 U.S. 368 43
Dalehide v. *United States*, 346 U.S. 15 47
Erie R. Co. v. *Tompkins*, 304 U.S. 64 12, 46
Ewing v. *Gardiner*, 341 U.S. 321 44
Frank v. *Mangum*, 237 U.S. 309 37
Georgia R. & Elec. Co. v. *Decatur*, 295 U.S. 165 (1935) 11, 42
Grannis v. *Ordean*, 234 U.S. 385 34, 43
Graver etc. Co. v. *Linde*, 336 U.S. 271 40
Kelley v. *Everglades Drainage District*, 319 U.S. 415 2, 17, 34, 36, 39, 44, 45, 47

Kennedy v. *Porter*, 170 So. 236 23
McDaniel v. *Lisholt*, 359 U.S. 26 44
Meyer v. *Nebraska*, 262 U.S. 390 45

Mississippi Code, 1942—

Section 99 15
Section 517 15
Section 1390 ..... 13, 40
Section 1639 14

National Labor Relations Board v. *Jones & Laughlin*, 301 U.S. 1 45
Owen v. *Owen*, 88 So.2d 100 40
Perry v. *United States*, 294 U.S. 330 ..... 13, 46
Phelps Dodge v. *Labor Board*, 313 U.S. 177 45
Pittman v. *Martin*, 43 So. 668 40
Pound, "Jurisprudence", III, 156, 159 45
Rules 11, 14(3), and 33, Miss. Supreme Court 14
Saunders v. *Shaw*, 244 U.S. 317 ..... 2, 17, 33, 34, 36, 38, 43, 46, 47
Schware v. *Board*, 353 U.S. 232 ..... 13, 46
Securities, etc., Com'n, v. *Otis & Co.*, 338 U.S. 843 44
Skrmetta v. *Moore*, 30 So.2d 53 23
Southern Package Co. v. *Beall*, 180 So. 789 ..... 33, 34, 36, 40
State Highway Com'n v. *Coahoma County*, 32 So.2d 555 41
Steen, In re, 134 So. 67 41
Texas, etc., R. Co. v. *Railway Clerks*, 281 U.S. 548 45
Texas & Pac. R. Co. v. *Rigsby*, 241 U.S. 39 38
Thompson v. *City of Louisville*, 4 L.Ed.2d 654 37
Tot Case, 319 U.S. 463 11
Turnipseed Case, 219 U.S. 35 11
United Gas Pub. Ser. Co. v. *Texas*, 303 U.S. 123 37
U.S.C., Tit. 28, Sections 725, 1257(3) 3, 12
White v. *State*, 131 So. 96 41
Wilkerson v. *McCarthy*, 336 U.S. 53 23
Wilson Cypress Co. v. *Del Pozo*, 236 U.S. 635 40
Yazoo, etc., R. Co. v. *Adams*, 32 So. 937 41

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S. D. G. HUTTON,
Respondent.

PETITION FOR WRIT OF CERTIORARI AND SUMMARY REMAND FOR TRIAL OF DEFENSIVE ISSUES PRETERMITTED BY CHANCELLOR, OR FOR CERTIORARI AND ARGUMENT; TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioners respectfully pray that a writ of certiorari be issued to review an anomalous judgment of the

Mississippi Supreme Court, for specific performance, fatally defective because made without required findings at trial of facts that a contract had been created, without required findings at trial on other pleaded, defensive facts, and without supporting evidence, and which reversed a decree of the Chancery Court of the County of Holmes, Mississippi, in favor of the Petitioners, dismissing respondent's bill for specific performance of an alleged agreement to sell land; and Petitioners pray that at the same time the case be summarily remanded for trial of defensive issues not reached or tried by the Chancellor, to correct flagrant denial of Due Process apparent on the face of the record, in the light of *Saunders* v. *Shaw*, 244 U.S. 317 (1917), *Kelley* v. *Everglades Drainage District*, 319 U.S. 415 (1943), and other cases (digested pp. 38, 39, below).

The opinion and decree of the Chancery Court of the said County of Holmes appears in the record at pages 398-406 and 407-410, and the opinion is printed at pages B-1—B-9 hereof. The opinion of the Supreme Court of Mississippi in this case appears in the record at pages 424-440, is printed in 119 Southern Reporter, 2d, 369, and in this petition at pages B-10—B-25; and contains the order to enter a decree of specific performance for Respondent, and judgment thereon (R. 441). The final orders of the State Supreme Court, of reversal, and denying Petitioners' motion for rehearing or remand for trial of issues pretermitted at trial when decree for Petitioners was given, appear at pages 441, 487 and 497 of the record and B-26 and B-27 below.

STATEMENT OF STATUTORY GROUNDS ON WHICH THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES IS INVOKED.

April 4, 1960, was the date of the decision reversing the Chancellor's decree for Petitioners (R. 424, 441) and of the order to remand the case for entry of a decree of specific performance for Respondent, in pursuance of the said order.

May 2, 1960, was the date of the order overruling the Petitioners' Suggestion-of-Error and Implementing Motions, which raised Federal Due Process questions (R. 487). And July 11, 1960, was the date of the order overruling Petitioners' motions for leave to file motion to reargue the Due Process right to remand for trial of pretermitted defensive issues on which special findings were requested, under Rule 33 of the State Supreme Court (R. 497).

Statutory authority for review by the Court on certiorari is given in Section 1257(3), Title 28 U.S.C., as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had may be reviewed by the Supreme Court as follows: * * * (3) By writ of certiorari * * * when any title, right, privilege, or immunity is specially set up or claimed under the Constitution * * * of * * * the United States."

QUESTIONS AS TO RELIEF SOUGHT AND DUE PROCESS PRESENTED FOR JUDICIAL REVIEW.

I. Denial of Procedural Due Process by Refusal of Remand for Trial in Chancery Court of Defensive Issues Pretermitted by Chancellor in Giving Decree for Petitioners (Defendants in Trial Court).

The Petitioners seek relief by certiorari and summary remand for trial of their defensive issues of fact, as pleaded in their answer (denying that a contract had been created and alleging Respondent's conduct had been misleading and inequitable)[1] which have not been tried or disposed of in the trial court,[2] but were decided in the State Supreme Court, an appellate court having no authority thus to try fact issues *de novo*.[3]

Hence, the Petitioners suggest that the first question for review reduces to:

Whether on this record such manifest denial of procedural Due Process is shown as to call for certiorari and summary remand for trial of the pretermitted defensive issues (in the light of *Saunders* v. *Shaw*, *supra*, *Kelley* v. *Everglades Drainage District*, *supra*, and cases on basic liberty of contract and property rights, cited at page 45 hereof) in order that the fundamental rights of the Petitioners may be preserved to have a trial of defenses pleaded, not decided by the Chancellor as Trier of Facts,[2] but improperly decided *de novo* (on a record restricted to

1 See p. 19 below.

2 See p. 29 below.

3 See p. 30 below.

only part of the case)[1] by an appellate court which has no power under the State Constitution to try fact issues *de novo*; and

Under the Constitution of the United States, and the legal order of Due Process thereby established, binding the Judges in every State, may a State appellate court shift ground of decision to an untried fact-issue,[2] and thereby arbitrarily deprive defendants of a trial of their defenses?

Or, in the alternative the question is whether this case is a useful precedent for a full opinion of the Court, applying to special-findings procedures in equity the requirement of Due Process that defendants must have a trial of their defenses (recognized in such cases as the present in *Saunders* v. *Shaw*, *supra*)

In sum, in such case as the present one in which special findings on defenses are required, are pretermitted, and the appellate court shifts grounds of decision and usurps the power of a trial court and decides a case on a restricted record, will this Court protect the defendants' rights to Due Process?

In concrete form the questions are:

Right to Trial of Defenses.

Where

(1) In an action for specific performance of an alleged contract to sell land the property owners are the Peti-

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1. See p. 30 below.
2. See p. 30 below.

tioners; and the Petitioners plead operative facts showing no contract was created, that the Respondent misled and mistreated them in an inequitable manner, and the Petitioners ask the Chancellor to make special findings of fact and conclusions of law on these defensive facts which were summarized as the seven defensive issues of the case, in the manner provided by statute for such pleadings;

(2) The Chancellor exercises his discretion to rest a decree for Petitioners on a part of only one defense pleaded (No. 2 of the findings-request in the answer, quoted at page 21 hereof), omits findings on the remaining six defenses and on two parts of the other defense, and expressly states that a finding on Respondent's inequitable conduct as alleged by the Petitioners is not necessary in giving a decree for the Petitioners, because he found Respondent's purported acceptance was a counter-offer (as alleged in substance in defense No. 2, above); and also excluded competent evidence offered to prove said defenses;

(3) But the State Supreme Court reverses the Chancellor on his ground of decision, leaves the other requests for findings of fact issues by the Chancellor unsatisfied and undisposed of, and finds by a *de novo* decision exceeding the Court's appellate power on a restricted record omitting competent evidence for Petitioners that the Respondent's conduct was equitable, and overruled the Petitioners' motion for a trial *de novo* in the proper court of the said untried defenses;

Then

The question is whether this appellate judgment arbitrarily denies a trial and hearing of Petitioners' defenses to the suit, and so denies procedural Due Process of Law to the Petitioners.

Right to Object to Exclusion and to Have Opportunity to Introduce Defensive Evidence.

Also,

Where gross error in excluding material evidence[1] offered in defense by Petitioners is rendered harmless at the trial because the decree was for the Petitioners and they cannot object to such exclusion in the appeal from said decree, but on appeal the decree for Petitioners is reversed, findings on the issues are made *de novo*, the Petitioners are taken by surprise and move for remand for a trial on the issues with opportunity to introduce evidence but this motion for a fair trial is overruled,

Then,

The question is whether Petitioners have had a fair hearing with opportunity to introduce evidence as required by Due Process of Law under the Constitution of the United States.

II. Denial of Substantive Due Process.

Liberty of Contract and Property.

Where the record, such as it is, shows that the finding of the State Supreme Court (that Petitioners made an unconditional offer and the Respondent made an unqualified acceptance, and that the Petitioners repudiated their agreement) is without any supporting evidence, and contradicts undisputed written evidence of and vetoes strict conditions annexed to the Petitioners' offer to negotiate,[2]

Then,

The next question is whether the finding nullifies the liberty and power of making conditions precedent to open-

1 See p. A-6 for exclusions of evidence.

2 See pp. 44-45 below.

ing negotiations and precedent to divesting Petitioners of their property and vesting rights in Respondent, and so strips them of liberty and property contrary to substantive Due Process of Law.

Questions for Review in Detail.

The questions for review at length are, in detail:

ARBITRARY DECISION UNSUPPORTED BY EVIDENCE; DENIAL OF BASIC CONSTITUTIONAL RIGHTS.

Involved in the case are the following factual questions of fundamental rights arbitrarily violated by the decree of the State Supreme Court:

1. VETO OF CONDITION PRECEDENT TO NEGOTIATION.

Whether under the undisputed (although incomplete) documentary facts of the case, and undisputed testimonial evidence, the State Supreme Court arbitrarily refused to give effect to Petitioners' requirement that Respondent make written retraction of and expression of regret (for public, unprintable insults to one of the Petitioners, his Sister, and to a Brother, not a party to this case) before negotiations should open, and has given effect to an attemptive acceptance sent before apology made.[1]

2. PETITIONERS' RIGHT TO NEGOTIATE FOR FAMILY SETTLEMENT STOPPING LITIGATION OF FRIVOLOUS CLAIMS.

Whether the State Supreme Court arbitrarily held, (1) that Petitioners had no right to ask as a condition of the Family Settlement that the Respondent discontinue his litigation claiming title for his Daughter on the untrue

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[1] See pp. 26-28 and 30 below.

allegation that she alone was named and known in this Family as "Rosalind Gwin Hutton", and (2) that Petitioners had no right to defend on the ground pleaded that Respondent misled Petitioners by inequitable conduct and representations into thinking that he accepted the decree establishing Mrs. Johnson's title as devisee under the name "Rosalind Gwin Hutton", and held arbitrarily (3) that the Respondent's conduct in this matter was equitable.[1]

3. VETO OF ACTUAL PAYMENT AS CONDITION PRECEDENT TO CREATING RIGHTS IN RESPONDENT.

Whether the State Supreme Court arbitrarily has refused to give effect to written conditions that actual payment of the proposed price was the only condition on which the Respondent should receive any rights in or to the property of the Petitioners, which conditions were made before negotiations opened.[2]

Whether this is a denial of the basic liberty of contracting on reasonable conditions only, and is contrary to Due Process.

In short, did the State Court action arbitrarily deny bargaining power and liberty of contract to the Petitioners?

4. ARBITRARY FINDING OF EXECUTORY CONTRACT TO SELL LAND.

If the present case is treated at length, whether the finding of the appellate Court (1) that the Petitioners gave Respondent the right to accept by a letter promising to pay cash (as distinguished from accepting by the act of paying cash), and (2) that a promise to deliver cashier's

1 See pp. 26, 27, 30, A-14, A-24, B-24 and B-25 below.

2 See pp. 26, 30 and B-18 below.

checks operated as an acceptance binding the Petitioners, is an arbitrary deprivation of property unsupported by evidence, is a *de novo* finding on appeal in a case in which the issue had not been tried and found in the trial court, and in which the intent of the parties had not been developed by competent evidence offered by Petitioners and admitted in evidence, and, therefore, whether this said finding should be reversed and the finding of the Chancellor reinstated (that cashier's checks were not cash as called for in Petitioners' March 2 letter), or whether the said issue should be remanded for trial *de novo* both as to the intent of the parties (1) to enter an executory or to enter an executed contract, and (2) as to the required medium of payment, and for the required findings thereon by the Chancellor, who has exclusive jurisdiction to make findings of fact *de novo*.[1]

5. Consistent Standards of Construction.

If the present case is treated at length, whether Respondent's letter of March 6, 1957, alleged to be an acceptance, was correctly construed by the State Supreme Court as an unqualified acceptance of Petitioners' proposals to negotiate; or whether this issue should be remanded for trial *de novo*, on consistent standards of construction, unlike the present State opinion and decision which is liberal in construing Respondent's letter of March 6th[2] and strict and far-fetched in construing Petitioners' letter of March 2, 1957,[3] on proposed terms. Even apart from the context of the series of letters, whether the language of the March 6th letter shows a qualified acceptance, viz., ("*This* is to acknowledge receipt of your letter of March 2, 1957."

1. See pp. 41, 44 below.
2. See R. 462-463.
3. See R. 451-452

"I hereby accept your offer as set forth in *this* letter." Then follows Respondent's counter proposal.) (Italics added) (R. 243, 244).

6. Arbitrary Presumption.

On the present record (see pp. A-6—A-8, Appendix A for documentation) the Chancellor excluded all of Petitioners' evidence showing that the intent of the two letters of March 2, 1957, was to express a willingness to accept apology for and to overlook gross insults, and only then to open negotations for a cash sale, without obligation until cash was paid, because the Chancellor applied an irrebutable presumption that all the long negotiations had been merged in the two short notes of March 2, 1957.

The question is whether the conclusive presumption applied by the Chancellor denied Due Process, contrary to the doctrines of *Georgia R. & Elec. Co. v. Decatur*, 295 U.S. 165, 171 (1935) and the *Turnipseed* and *Tot* cases, 219 U.S. 35 (1910) and 319 U.S. 463 (1942); and whether Petitioners had an unfair trial because the decree in their favor in the trial court cut off objection on appeal to the arbitrary presumption, and the appellate court denied new trial with opportunity to offer this excluded evidence.

7. Arbitrary Finding of No Obligation of Respondent to Pay Interest and Attorney Fees Contracted for in Notes Made by Respondent and Held by Executor for Collection As Asset of Estate.

The decree of the State Supreme Court cancelled interest and attorney fee obligations of Respondent under clauses of promissory notes made by Respondent and held for collection by the Executor as assets of the Estate. The Chancellor found that no evidence was offered by Respondent to prove a claim of set-off pleaded by Respondent and

that the Executor, and not Petitioners as individuals, was the holder.[1] Not one scintilla of evidence is in the record showing any defense to the payment of said notes, with interest and attorney's fees, to the Executor. The State Supreme Court arbitrarily annuls an obligation of a contract. In this situation, the question is:

Whether the decree of the State Supreme Court is a violation of a property right in the notes, contrary to Due Process protection of property, or is a State judicial abrogation of the obligation of contracts, contrary to Article I, Section 10, Constitution, U.S., in the light of Section 34, Judiciary Act of 1789, 28 U.S.C. 725, in which "laws" meant court decisions having the effect of law, in the interpretation given in *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, per Brandeis, J., and Edward S. Corwin, "Constitution of the United States of America, Analysis, and Interpretation", Senate Document No. 170, 1952, page 332.

8. ARBITRARY FINDING AGAINST PETITIONERS' GOOD REPUTATION.

Whether the State Supreme Court has so aggravated its arbitrary denial of a fair trial for the defense as to require a new trial because it declared the Petitioners "repudiated their agreement", a declaration contrary to undisputed documentary evidence (*i. e.*, reservation of the right to end negotiations and of continued efforts by Petitioners to have Respondent continue negotiations before they exercised the right to terminate, viz., letters of March 5, April 13, May 20, May 25, and May 31, 1957).[2]

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1. See p. A-23 below.

2. See p. 28 below.

Whether a Petitioner who is a member of the Bar of the State Supreme Court and of this Court may be declared to be one who has "repudiated" an agreement in a case in which he has not been permitted to try this issue of repudiation, a charge which is a reproach, as recognized by this Court in *Perry* v. *United States*, 294 U.S. 330, 351, (1935), and where professional repudiation thereby attacked is a valuable right and interest under the protection of the Due Process Clause, as recognized by this Court in *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 247 (1957).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE; VERBATIM EXCERPTS.

I. In Matters Pertaining to the Action for Specific Performance, and Arbitrary Decree of State Supreme Court.

1. Mississippi Chancery Pleading, on Special Findings of Fact, on Issues of a Case; Section 1390, Mississippi Code of 1942:

> "Facts separately found.
>
> "The chancery courts in all litigated cases, upon request of any party to the suit, shall find the facts specially and state separately its conclusions of law thereon, and its findings and conclusions shall be entered of record and, if an appeal is taken from the decree, shall be included by the clerk in the record which is certified to the Supreme Court."

2. Constitution of the State of Mississippi, 1890, Section 146:

> "The Supreme Court shall have such jurisdiction as properly belongs to a court of appeals."

3. Mississippi Code of 1942, Section 1639, Exceptions to Errors in Admission of Evidence Abolished:

> "And in such a trial [in all criminal cases and in all civil cases], provided objections are duly made and noted, no exception need be taken, either for the purpose of appeal or otherwise, or if taken shall not be noted, to any ruling or decision of the court, and this provision shall include the rulings of a court on objections to testimony."

4(a). Rule 11, Supreme Court, Mississippi; No Reversal for Harmless Error:

> "No judgment shall be reversed on the ground of * * * the improper admission or exclusion of evidence * * * unless it shall affirmatively appear, from the whole record, that such judgment has resulted in a miscarriage of justice."

4(b). Rule 14(3), *ib.*, Only One Suggestion-of-Error:

> "After a suggestion-of-error has been sustained, or overruled, by the Court, no further suggestion of error shall be filed by any party."

Rule 33, *ib.*, Rules May Be Suspended:

> "These rules shall be considered as general rules for the government of the Court and the conducting of causes; and, as the design of them is to facilitate business and advance justice, they may be relaxed or dispensed with by the Court in any case where it shall be manifest to the Court that a strict adherence to them will work surprise or injustice."

5. Due Process, Supremacy and Judicial Power Clauses of the Constitution of the United States of America:

> Amendment XIV, Section 1, Second Sentence, Clause 2; Article VI, Paragraph 2; Article III, Section 2.

II. Statutes Involved In the Matters Pertaining to the Executor's Right and Title in Notes of the Estate, and the Contract of Respondent as Maker, under State Law.

1. Mississippi Code of 1942, Section 517:

"Every executor * * * shall have the right to the possession of all the personal estate of the deceased, unless otherwise directed in the will * * *. He * * * shall collect all debts due the estate as speedily as may be, * * *."

2. Mississippi Code of 1942, Section 99:

"The maker of a negotiable instrument by making it engages that he will pay it according to its tenor, and admits the existence of the payee and his then capacity to indorse."

3. The Constitution of the United States of America, Article I, Section 10:

"No state shall * * * pass any * * * Law impairing the obligation of Contracts."

STATEMENT OF PROCEDURE AND FACTS.

Summary of Ultimate Facts Here Pertinent.

The facts to be stated show how:

(1) The State Supreme Court, in reversing the decree for the Petitioners and refusing remand for trial of untried defenses, arbitrarily denied the Petitioners' right to a fair trial and opportunity to introduce evidence on their answer and defenses, pretermitted by the Chancellor, and denied their statutory and constitutional right to a finding thereon by the Chancellor as Trier of Facts; and how

(2) The State Supreme Court arbitrarily vetoed Petitioners' written conditions precedent to transaction of business with Respondent and to vesting any rights in him, thereby depriving Petitioners of liberty of contract and valuable property without Due Process of Law; and, hence

(3) The Petitioners properly may seek relief by certiorari and summary remand for trial of defenses pleaded as required by Due Process.

I. Outline of Defensive Issues and Procedure.

Since the relief sought is certiorari and summary remand for trial of defenses pleaded but not passed on by the Chancellor as Trier of Facts, in the light of *Saunders v. Shaw*, *supra*, *Kelley v. Everglades Drainage District*, *supra*, and other cases, the synopsis of the issues to follow is necessary to show denial of Due Process and a fair trial of these issues, and the right to relief by certiorari and summary remand, for trial of defenses, and not because the Court is asked to pass upon the merits of the case finally, unless the Court considers it is a precedent of general interest.

Summary of Procedure.

This case came to trial on bill for specific performance and answer denying a contract was created, alleging the Respondent inequitably misled the Petitioners, and requesting findings on seven issues of fact and conclusions of law therefrom. On objection by Respondent, the Chancellor erroneously excluded the Petitioners' documentary and testimonial defensive evidence, showing no contract was created by them in the series of letters relied on by Respondent. The Chancellor did not make the requested findings, and expressly said it was not necessary to decide as to the Respondent's inequitable conduct alleged by the

Petitioners (R. 404). He rested his decision for the Petitioners on the point that Respondent's alleged acceptance was not responsive to Petitioners' proposal to negotiate, was a counteroffer, therefore no contract was created (R. 403-404). Then the Chancellor dismissed Respondent's bill for specific performance, and gave judgment for the Executor on notes made by the Respondent in the action consolidated with the action for specific performance.

But the State Supreme Court reversed the Chancellor on his one ground of decision, found *de novo* and arbitrarily (1) that a contract had been created, (2) that the Respondent's conduct was equitable, ordered a decree for the Respondent, and overruled Petitioners' motion for remand of the case for trial on Petitioners' defensive issues set up in their answer and not reached or decided by the Chancellor.

Thus, the decree of the Supreme Court is not based on and is without any findings of fact by the Chancellor on the fact issues pleaded by the Petitioner and nullifies the written condition of negotiations; and on this basis the Petitioners will contend that the final decree of the State Supreme Court in this case is null and void, and that the Supreme Court of the United States has power and authority to grant certiorari and summarily to remand the case for trial on the defensive issues set up by the Petitioners in a trial *de novo*, within the doctrines of *Saunders* v. *Shaw*, 244 U.S. 317 (1917); and *Kelley* v. *Everglades Drainage District*, 319 U.S. 415 (1943).

First Ultimate Issue of Fact on Petition for Certiorari.

In the present petition for certiorari on the point of procedural Due Process, the first ultimate fact to be proved from detailed facts is that not only have Petitioners not had a fair trial, but they have not had a trial at all on the seven

defenses pleaded by them, because the evidence was excluded, and the required findings were not made (except on one point as to what is "cash", under defense No. 2). It follows from this that the State Supreme Court exceeded its judicial power in deciding the fact issues of the case *de novo*, and is void under the Due Process Clauses of State and Federal Constitutions because denying procedural Due Process which entitles Petitioners to a trial and findings on their answer and defenses, and because denying substantive Due Process by taking away liberty of contract and property without fair trial, arbitrarily nullifying written conditions precedent to opening negotiations and vesting rights in Respondent.

The burden of proof of showing a contract was created rested on the Respondent. Petitioners have not had a trial with opportunity to put in evidence on this issue, as required by Due Process.

The practical, present issue is:

Does Due Process require that this case be sent back for a t· .al of the Petitioners' answer, and its undecided issues denying the creation of a contract and alleging inequitable treatment of Petitioners by Respondent in falsely pretending to enter a family settlement transaction?

Present Case Not One of Construction of Established Contract.

This is not a case in which the issue is the construction of an established and admitted contract; but it is a case in which the central issue pleaded and contested is whether a contract was created, whether contractual intent was shown, and whether the Chancellor as the only proper trier *de novo* of issues of fact and law has tried the issue made and has made a record and a finding on this issue of contractual intent, on a record of competent testimonial

and written evidence free of harmful error. It is beyond dispute that the issue of contractual intent has not been tried in this case by the Chancellor; and it is clearly established by the statute and case law of Mississippi that the issue may not be tried in such a case as the present *de novo* in the State Supreme Court, where special findings have been requested in pursuance of the statute, Section 1390, and the record has been restricted by exclusion of defensive evidence in such a way as to deprive the defendant of opportunity of showing error in exclusion on issue of no-intent to create a contract, as distinguished from varying terms of an admitted contract (See pp. 40-41 below for citation of cases construing the statute).

Issues of Fact Pleaded, Forming Bases for Legal Conclusions to Be Urged.

1. Issues of Bill for Specific Performance.

Respondent filed a bill for specific performance in August, 1958, alleging and assuming the burden of proving that a letter by Petitioners of March 2, 1957, and a letter of March 6, 1957, by Respondent constituted a contract, that he had performed his duties and that the Petitioners had breached the alleged contract to sell land, and demanded $10,000.00 damages for breach of contract (R. 2-11).

2. Issues of the Answer Summarized (For Digest, see Appendix A below).

The Petitioners by sworn answer joined issue with Respondent's bill for specific performance as follows:

(1) By denial that their short note of March 2, 1957 (detached from a series of letters seeking to end Respondent's quarrels over paying his debts to the Estate, and his counter-charges against Petitioners), was intended or un-

derstood as an unconditional, final or complete offer to sell the land involved (R. 24, 26, 27, 28, 29, 31, 33);

(2) By pleading the purport and effect of the whole series of letters in which the Petitioners proposed an amicable settlement of Respondent's contentions[1] with his Parents' family, but in which the Respondent unconscionably deceived Petitioners,[2] did not consummate any agreement proposed by the Petitioners, and now seeks to take inequitable advantage[3] of them by deception in the present suit; and

(3) By summing up Petitioners' denials and defenses in seven issues on which the Chancellor as Trier of Facts was requested to make special findings, and, as Judge, separate conclusions of law therefrom (R. 41-42, 210). This request was made twice, once at the end of the answer (R. 41-42) and again at the end of the trial (R. 210). Such request is authorized and findings are required in such case under Section 1390, Mississippi Code, 1942, as construed in cases cited on page 40 hereof.

Under the cited statute, the Petitioners (Respondents in the Chancery Court) requested the Chancellor to "find the facts specially, and to state separately the conclusions of law therefrom upon the issues

(1) "that the Respondents made no complete and final offer to the Complainant prior to their draft of the

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1. Litigation over Respondent's notes held by the Estate, over identity of Rosalind Gwin Hutton, devisee of 1/3 of the land, and terms of proposed lease of land (R. 36).

2. Ostensibly recognizing Mrs. Johnson's title by stipulating in his deed that she was the intended devisee, then attacking her title on appeal, and losing the appeal. See p. A-14 below.

3. In present suit, claiming a binding agreement was reached. See p. A-16 below.

'Agreement and Warranty Deed Covering Land' of April 13, 1957;

(2) "that Complainant's letter of March 6, 1957, which is an exhibit to his bill is a counter-offer and is not an acceptance of terms proposed or offered by the Respondents;

(3) "that the Complainant made no valid acceptance of Respondent's proposal for an agreement and deed of April 13, 1957;

(4) "that it is inequitable for the Complainant to enter negotiations for an amicable settlement of litigated claims and for sale of land, and to attempt to hold the three Respondents as obligated to enter such contract and sale, and to execute a deed, and pay him damages, and at the same time to litigate title to one share of the land;

(5) "that Complainant has not paid the 1956 and 1957 rent balances on the said land, which payment was made a condition of completion, within a reasonable time, of the negotiations, and such continued delay and default is not equitable;

(6) "that the Complainant has not used due diligence in negotiating the proposed sale to completion as required by Respondent's offer to negotiate the sale on March 2, 1957;

(7) "and that the Respondents were entitled to close, and did close the negotiations on May 31, 1957, without any breach of any duty to the Complainant, and without liability in damages to him, because the Complainant himself dropped negotiations and resumed litigation, instead of completing the proposed Family Settlement."

II. Outline of Factual Background of Present Case.

1. Specific Pertinence of the Facts: Substantial Federal Rights Involved but Trial and Findings Thereon Denied.

To grant the relief requested of remand for a trial of Petitioners' issues for the defense, it is not necessary that the Court weigh finally the facts in issues on the merits. The Court need only look far enough to see (1) that on these pleaded issues the Petitioners were entitled to a trial and findings by the Chancellor, but the essentials of a fair hearing and trial and findings by the Trier of Facts were denied by the final order of the State Supreme Court; and the Court need only look far enough to see (2) that even on this restricted record the State Supreme Court has arbitrarily denied substantive Due Process in nullifying and vetoing the Petitioners' written conditions precedent to opening any business transaction with the Respondent until he retracted public, unprintable insults, and in nullifying conditions precedent, *i. e.*, cash payment and other specified acts, to vesting any property rights in him derived from them.

The Petitioners' liberty of contracting with Respondent only on condition of respect for human personality is vital to the peace and harmony of their families, and so is a vital right; the Petitioners' valuable property also is a necessary means of support; and both involve substantial Federal rights and so are protected by Due Process.

2. Evidentiary and Procedural Presumption.

The Petitioners ask recognition of the procedural presumption on the factual background of the truth of Petitioners' pleadings and evidence, for purposes of deciding their right to a trial and to findings on the issues as a matter of Due Process of Law.

The statement of the facts of this case includes as facts where expressly indicated the statements made in Petitioners' pleadings, because the Chancellor as Trier of Facts omitted decision of the Petitioners' defenses, and expressly stated that decision of Respondent's inequitable conduct to Petitioners as alleged by Petitioners was not necessary to a decision for them, and, since the decision of these issues by the State Supreme Court *de novo* is unauthorized,[1] leaves the defensive issues untried. It is believed that the facts as pleaded by Petitioners are to be taken as true for purposes of review of the Due Process right to a trial;[2] and, similarly, the evidence offered by the Petitioners on these issues is presumed to be true.[3]

With benefit of this principle of the procedural presumption, and for the purpose only of determining Petitioners' procedural and substantive Due Process right to a remand for trial of their said defensive issues on this record, the facts are outlined and summed up, with references to support the characterization given.

1. Sec. 1390, Miss. Code 1942. *Southern Package Co. v. Bevill, Saunders v. Shaw*, and cases p. 40 below.

2. *Kennedy v. Porter*, 170 So. 226, 176 Miss. 742 (1936) (Answer stricken on motion is presumed true on appeal.)

3. *Skrmetta v. Moore*, 36 So.2d 53, 202 Miss. 585 (1947). *Wilkerson v. McCarthy*, 336 U.S. 53, 57 (1949). The case stands as if a demurrer had been offered both to the pleaded defenses and to the offered evidence, and as if a ruling had been made denying the Petitioners a right to findings on defenses pleaded, and also the right to make reasonable conditions for opening negotiations with Respondent and for consummating a land sale to him. In such case the pleader is entitled to have the truth of his pleadings when taken to be true constitute a legal defense

3. Transaction in Issue: Petitioners' Proposed Settlement of Respondent's Economic Problem and of His Contentions with His Parents' Family, the Petitioners; and Respondent's Abandonment of Negotiations.

For the purposes of this petition for Due Process by certiorari, the gist of this case pleaded and offered to be proved, but evidence of which was largely excluded, is the Petitioners' Constitutional right to propose, and to be bound only by their proposed, conditions and terms for settling Respondent's difficulties and litigations with them and for negotiating a cash-on-the-barrel-head sale of land with the Respondent (R. 469-470, 478, 480-481, 485), under the circumstances now to be summarized.

Here the ultimate fact which Petitioners would show is that they had every reason to propose an end to Respondent's claims and lawsuits against the.. proposed a settlement, Respondent apparently agreed to enter negotiations and to end the litigation but deceived Petitioners and seeks to take unfair advantage in the present suit. The supporting facts are summarized in the following paragraphs.

On June 25, 1955, the Respondent secured a written lease for 1956 and 1957 to the 200-odd acres of cultivated land near Tchula, Mississippi, here involved, from Mrs. R. G. Hutton, his Mother (R. 372-373); paid a part of the rental in cash and for the balance made two notes together for $3,200.00 payable to Mrs. Rosalind Gwin Hutton, due respectively November 1, 1956, and November 1, 1957 (R. 409, decree; 405, Court finding; 370-371; R. 165 Pleading of Petitioners). On July 19, 1955, Mrs. R. G. Hutton revised her Will by charging Respondent with capital advanced to him, not devising any farmland to Respondent, and devising the farmland to the three Petitioners, one a resident of Maryland, one of North Carolina, and one of Jackson.

Mississippi (R. 214-215, 217, 19-21). The said Mrs. R. G. Hutton died on November 23, 1955. The Respondent attacked the Will,[1] filed claims against the Estate, dropped same (R. 167, declaration of Executor), denied liability on the said rent notes, dropped the Will contest, claimed his Daughter, Rosalind Gwin Hutton, III, was devisee of 1/3 the land under a devise to "Rosalind Gwin Hutton", alleging she was the only person of that name, demanded construction of the Will, and also complained that he could not support his family unless he could lease the land for 1958 (R. 34-37. Purport of letters and exhibits, answer of Petitioners). The Executor had filed a petition January 5, 1957, to construe the Will at Respondent's demand (R. 21, Answer of Petitioners); but on January 29, 1957, in response to Respondent's cry of hardship, the Petitioners offered to settle all Respondent's outstanding contests and to lease the land to him for 1958 at the same rental Respondent had agreed on with his Mother, Mrs. R. G. Hutton, in June 1955 (R. 37, 388-389, letter admitted for identification). Respondent declined, but offered to buy 1/3 of the land on behalf of his Daughter from Mrs. Johnson, one of the Petitioners (R. 37, Answer). Petitioners did not accept this offer, which was made on February 4, 1957. On March 1, 1957, the court in charge of the Estate construed the Will and held that Respondent's Daughter, Rosalind Gwin Hutton, III, had no title to 1/3rd of the said land, but that the devise of it was to the Testatrix' Daughter and namesake, one of the Petitioners, Mrs. Rosalind Gwin Hutton Johnson (R. 3, Respondent's Bill).

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1. Alleging mental incapacity of Testatrix July 19, 1955, at a time when he had admitted her capacity to indorse notes made by him payable to her in consideration of written lease taken from her, June 25, 1955, as appears from this record, under Sec. 99, Miss. Code, 1942, on admission by maker of note of capacity of payee to indorse (R. 35, 214-215, 372-373)

At the court house, when this decision was made, the Respondent became angry, and cursed and grossly insulted one of the Petitioners, Mrs. McCutchan, and also a Brother, who is not a party to this case (R. 262-263, 326, 37 Answer of Petitioners). Then the next morning, March 2, 1957, by telephone, the Respondent asked the Petitioners to sell to him in his own right the entire three tracts of land (R. 327, 336; 37, Answer of Petitioners).

On March 2, 1957, the Petitioners replied by two notes, not mailed, but handed in person to Respondent (R. 325-326, 377-378); and made two conditions: (1) Before the Petitioners would transact any business with Respondent, it would be necessary that he make written retraction of and expression of regret for his said gross, personal insults of the previous day, and (2) that the proposed sale would be for cash.[1] By letter of March 5, 1957 (actually received March 10, 1957, Respondent testified), Petitioners informed Respondent further that the offer to sell for cash was a simple offer based on no consideration and that no obligation was assumed, unless and until the proposed price was paid cash-on-the-barrel-head in exchange for a deed.[2]

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1. March 2, 1957: "Before we transact business with you it will be necessary for you to give written expression of regret for and retraction of the statements you made to Mary Ryburn and Charlton on March 1, 1957." (R. 241-242).

March 2, 1957: "We will sell our rights by warranty deed * * * for $30,000 cash, etc. etc." The full text of these letters is given on pages 241-242, 239, 240, of The Record.

2. March 5, 1957: "It is not our intention to be obligated legally to you in any respect unless and until you

On March 8, 1957, Respondent mailed a definite apology (R. 262, 263) to one of the Petitioners (an indefinite apology of March 4th having been rejected March 6th) (R. 235, 256, 260, 261), and the Petitioner to whom the apology of March 8th was mailed wrote to the Respondent on March 9th (R. 268, 269) that she was mailing the apology to another Petitioner in Maryland and that a written reply would be made to Respondent after the apology was received in Maryland by the other Petitioner. On March 20th, 1957, Petitioners wrote to Respondent that they had begun drafting a deed, thereby indicating that the apology was accepted and negotiations had begun of the proposed land sale (R. 296, 297, 382). On April 13, 1957, the Petitioners

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pay over $30,000, in exchange for a deed to the land; and it is not our intention of giving you any ground or pretext of getting into court if we decide to revoke this offer prior to your payment of the $30,000. It is an open and simple offer, based on no consideration which we accept or desire to accept, as constituting any contract whatsoever; it is intended merely to give you a reasonable opportunity to see whether you want to raise and can raise $30,000 and care to lay it on the table in exchange for a deed. It is not our intention that our legal relationships shall be changed, or that we shall assume any obligation whatsoever to you, unless and until you accept in the prescribed manner of laying down the cash in exchange for the deed. There are several other matters to be cleared before we will even enter into a cash-on-the-barrel-head transaction with you." The text of this letter, in full, is given on pages 270-271 of the record.

For detail of dates of receipt and facts showing this March 5th letter was in Respondent's hands before negotiations were open for land sale, see R. 456.

sent to Respondent a draft of a deed and agreement (R. 272, 273, 275, 276). This draft stipulated that the devisee "Rosalind Gwin Hutton" of 1/3 of the land was Mrs. Rosalind Gwin Hutton Johnson, who was the person whose title was recognized by the decree of the preceding March 1 in the title contest which Petitioners desired to settle (R. 275, 276).

Now, on March 4, 1957, before apology was made and the sale negotiation was open, Respondent had left a draft of a deed with the Petitioners' attorney (R. 250-251), and the Respondent's own draft of a deed stipulated that the devisee, "Rosalind Gwin Hutton", of 1/3 of the land was Mrs. Rosalind Gwin Hutton Johnson, as decreed by the court on the previous March 1 (R. 250-251). Thus, both these drafts of deeds which are in evidence support Petitioners' pleaded defense that a settlement of this litigation was the basis of the proposed agreement, and that Respondent's later attack by appeal on Mrs. Johnson's title abandoned the entire negotiation.

Also, on March 6, 1957, again before the required apology was made and before negotiations of the sale were open, Respondent wrote a letter now alleged to be a binding acceptance of an allegedly unconditional offer made by Petitioners to sell the land (given in full on pp. 243, 244, record). But no agreement by Respondent was made to the Petitioners' draft of a deed of April 13, 1957, and no agreement by Petitioners was made to Respondent's draft of a deed of March 4, 1957. Then, on April 25 or 26, 1957, the Respondent reopened his attack on Mrs. Johnson's title, thereby abandoning the proposed family settlement (R. 339). By a series of letters dated April 13, May 20, May 25, and May 31, the Petitioners asked the Respondent to continue the negotiations, received no reply, and so closed the negotiations on May 31, 1957 (R. 272-273, 300-301;

298-299, 303-304). In June, 1958, the Respondent lost his appeal in his Daughter's name attacking Mrs. Johnson's title and then began the present litigation to force a conveyance from the Petitioners on the contention a contract was created by the letter of March 2, 1957, stating the proposed price, and the March 6th, 1957, letter of Respondent purporting to accept, but (Petitioners say) with three material qualifications; and also the Respondent demanded $10,000.00 damages for delay in deeding the land to him (R. 315-316; 22, Answer of Petitioners). His bill was dismissed by the Chancellor in the early part of 1959, but has been indorsed by the State Supreme Court in April, 1960, without a trial record containing the competent offered evidence and without a trial finding on the defenses requested by Petitioners under the State statute requiring such findings.

III. Trial and Appellate Procedure.

1. Chancellor's Rulings Excluding Petitioners' Proof, but Giving Decree for Petitioners on One Point.

At first the Chancellor erroneously applied the parol evidence rule to and excluded the whole series of letters and testimonial evidence[1] offered by the Petitioners to show no contract was created by the letters, and also excluded evidence of Respondent's inequitable conduct toward Petitioners in the case; but, nevertheless, later, the Chancellor gave decision for the Petitioners on the one ground that the Respondent's attemptive acceptance was invalid because he said in it he would deliver cashier's checks and not cash, as Petitioners had said would be necessary before legal relationships would be changed.

Consequently, the Chancellor omitted making the required findings of fact on the defensive issues pleaded by

1 See p. A-6 below.

Petitioners, and conclusions of law therefrom (except as to the cash requirement); and the Chancellor said a finding by him, as Trier of Facts, was not necessary as to Respondent's inequitable conduct alleged by Petitioners in their answer, as a bar to his claimed remedy of specific performance (p. A-17 below; R. 404).

2. Appellate Decision, Usurping Functions of Trier of Facts De Novo, and Arbitrarily Denying Petitioners' Liberty of Contract and Property Without Due Process of Law.

Then the State Supreme Court (1) reversed the Chancellor as to the ineffectiveness of Respondent's proposal of delivering cashier's checks, in lieu of cash, holding that if cash was meant Respondent could conform at the exchange (p. B-23 below, R. 438), (2) made a *de novo* finding on an imperfect record that the Petitioners had made an unconditional promise to sell land, to become binding on a promise by the Respondent to pay, which also the Court found, and thereby arbitrarily denied both procedural and substantive Due Process to Petitioners,[1] inasmuch as (a) the issue had not been tried and made subject to a finding by the trial court that a contract had been created, (b) the Petitioners' evidence, both documentary and testimonial, had been excluded, and (c) what evidence was in the record showed conclusively that the Petitioners had imposed conditions precedent to opening negotiations and vesting any rights in Respondent and that these conditions were not complied with so as to create a contract with Respondent.

The State Supreme Court made a finding of fact that Respondent's conduct toward Petitioners was equitable,[2] but the Chancellor had pretermitted this issue, expressly, and also had excluded Petitioners' evidence on it.[3]

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1 See pp. A-9, A-14 below.

2 See p. A-17.

3 See pp. A-16-17.

The State Supreme Court also without evidence to support it found the Petitioners had repudiated their agreement.

3. Action and Decision on Notes Made by Respondent and Held As Asset of Estate.

The Executor of the Estate of Mrs. R. G. Hutton is the holder of and is under duty to collect two notes payable to Mrs. R. G. Hutton made by the Respondent, June 25, 1955, due, respectively November 1, 1956, and 1957, each for $1,600.00, with interest after maturity and 10 percent attorney fees, if sued on. The Executor sued the Respondent on the notes in September, 1958. The Respondent claimed the Estate was indebted to him, but at trial the Chancellor found that Respondent offered no proof of the alleged set off. The Supreme Court reversed the Chancellor as to the interest and attorney fees, but the opinion is unclear as to the principal of the notes, although the word "rent" as used in the decision may be contended to apply to the rent note principal. The action was consolidated with the action for specific performance. See pages A-22-23 below, and R. 164-177, 405, 409, 439.

This is the basis of the Executor's position that the decision of the State Supreme Court is without a scintilla of evidence, and deprives the Executor of the Estate of property without Due Process and abrogates the obligation of contracts.

STAGE OF PROCEEDINGS AT WHICH AND MANNER OF RAISING THE FEDERAL QUESTION OF PETITIONERS' RIGHTS UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

On April 4, 1960, the State Supreme Court reversed the decree for Petitioners and gave its order to enter a decree for the Respondent. Then the Petitioners at once, on April 15, 1960, filed a Suggestion-of-Error that Petitioners had been denied Due Process of Law under the Federal Constitution in being deprived of liberty of contract and property by arbitrary disregard of written, undisputed conditions precedent to vesting contract rights in Respondent and denial of property or contract rights in negotiable instruments (R. 469, 478, 481, 484, 485); and also made Implementing Motions to cure want of Due Process by giving a rehearing or remand for a new trial on the defenses and issues of their answer (R. 485).

In the Implementing Motions, Petitioners asked that the case be remanded for a plenary trial and hearing *de novo* in order that the issues of the case as made by the Petitioners' answer and exhibits might be developed and the complete series of letters introduced since the record showed that the Chancellor exercised his discretion to exclude evidence in support of the pleadings of Petitioners and the exhibits to their answer, and since the entire transaction is competent and will demonstrate that the parties to the case never came to an agreement or a meeting of the minds and intentions on any agreement, and Respondent's action should be dismissed (R. 485).

The Chancellor had expressly ruled in his decision that it was not necessary to decide the inequitable conduct of Respondent "as alleged by defendants", thereby expressly pretermitting these issues, and rendering it neces-

sary on reversal that the case be re-tried. See page A-17 below. Also, Petitioners' Suggestion-of-Error in asking for remand for trial of said defenses expressly directed attention to the exercise of the Chancellor's discretion to exclude their evidence (R. 485), the evidence being both testimonial evidence and documentary evidence (pages A-3—A-7, A-16-17, below).

The said Court has had full and fair notice of its *great errors of negligence* in this case, as the following procedure will show.

The Petitioners were taken by surprise at the decision of the State Supreme Court of April 4 deciding pretermitted issues not found by the Chancellor as Trier of Fact, and were more surprised at the order of the State Supreme Court of May 2, 1960, refusing to grant Petitioners' motion to remand the case for a trial on the defensive issues of their answer. In this state of the record, the Petitioners had no further standing *as of right* to move for reargument, but gave notice to the Court (by Notice and Motions of May 30, 1960, filed June 3, 1960 (R. 488-490), in the same term and before mandate to the Chancery Court of Holmes County issued) of the Court's inherent power on its own motion to recognize the Petitioners' right to trial of the defensive issues, and specifically cited *Southern Package Co.* v. *Beall* and *Saunders* v. *Shaw* as approving Petitioners' Due Process right to such trial, gave notice of Petitioners' intention of filing petition for certiorari in this Court on or before August 1, 1960, and asked for stay of mandate pending proceedings on said petition for certiorari.

The State Supreme Court did not issue its order remanding said cause for entry of a decree of specific performance and the cause remained in the said Supreme

Court and subject to its jurisdiction. In order to exhaust all State remedies Petitioners by motions filed June 28, 1960, invoked Rule 33 of the State Supreme Court[1] (which reserves to the Court the right to suspend the strict rule permitting only one suggestion of error, along with other rules of the court, where deemed necessary to avoid surprise or miscarriage of justice), and asked leave to file at the July, 1960, motion day a motion for reargument of the motion implementing their Suggestion-of-Error, for remand of the pretermitted defensive issues, citing *Southern Package Co.* v. *Beall, Saunders* v. *Shaw*, and *Kelley* v. *Everglades Drainage District*, *supra*, as showing the Petitioners have a Federal right to a trial of said defenses as a matter of Due Process (R. 493). But on July 11, 1960, without opinion, the State Supreme Court overruled the said motions of June 28, 1960, and denied the Petitioners right to a trial of the said defensive issues pretermitted by the Chancellor, and to a fair trial on the issues of the said Petitioners' answer with opportunity to introduce evidence, asserted in their Suggestion-of-Error, and reasserted with citations to the aforesaid cases in the said motions of June 3 and June 28, 1960.

(See, on authority to raise Federal questions in Suggestion-of-Error in order to reach denial for the first time of basic rights in an appellate court and bring a case to the Supreme Court of the United States, the opinion of Mr. Justice Holmes in *Saunders* v. *Shaw*, *supra*, quoted on pages 43 and 44, below, and *Grannis* v. *Ordean*, 234 U.S. 385, 392 (1914).)

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1. Set out on page 14 above.

ARGUMENT OF REASONS FOR ALLOWING CERTIORARI AND FOR SUMMARY REMAND TO TRY THE UNTRIED DEFENSIVE ISSUES PLEADED AND TO MAKE REQUIRED FINDINGS OF FACT THEREON, OR FOR DETAILED REVIEW AS A USEFUL PRECEDENT ON INVALIDITY OF A DECREE MADE WITHOUT FINDINGS OF FACT REQUIRED BY STATUTE AND DUE PROCESS OF LAW.

Situation.

The present case was tried before a Mississippi Chancellor who acts both as judge and also as a one-man jury and who is required to make special findings of fact and separate conclusions of law therefrom on requested issues in pleadings. See Section 1390, Miss. Code, 1942; and cases p. 40 below.

The present record shows that the Chancellor trying the case made no findings on the Petitioners' defenses, duly pleaded (except one point on which he rested decision for the Petitioners), that while the State Supreme Court has only appellate power and has no power to make findings of fact *de novo*, nevertheless, the State Supreme Court has itself made findings of fact *de novo* in this case on a restricted and erroneous record and has given a judgment for Respondent without the required fact finding foundation afforded by a record of the trial of the issue and the findings *de novo* of the Chancellor, and in truth without supporting evidence even on the limited record before it.

Petitioners submit that Due Process of Law prohibits the taking away of liberty of contract and property from

1 Pages 30-31 above; 41, 44 below.

the Petitioners by this State judgment rendered without findings of fact by the Chancellor on legal defenses to the suit, just as Due Process would forbid execution of an accused man on a judgment without a verdict finding the facts of the case.

In this situation, the Supreme Court of the United States has power and authority to review and correct this anomalous State judgment for the following reasons:

I. Reasons for Certiorari and Summary Remand for Trial of Pretermitted Defensive Issues of Fact.

Since the record shows that the State judgment flagrantly denies the Constitutional right of Petitioners to a trial and findings on the fact issues of the case; the present case may be remanded summarily for trial *de novo* of the Petitioners' defenses, upon proof[1] that said issues have been made but have not been tried or found by the Chancellor. The request for summary remand is supported by decisions in *Saunders* v. *Shaw* and *Kelley* v. *Everglades Drainage District* in the Supreme Court of the United States and by *Southern Package Co.* v. *Beall*, and other cases in accord, in the Supreme Court of the State of Mississippi, to be cited herein (See pages 38-41 below).

II. Reasons for Grant of Certiorari Exercising the Judicial Power of the Supreme Court of the United States.

This case may be reviewed under the principles of Due Process as a useful precedent of general interest to prevent increase of the case-load of this Court and of other Courts from similar judicial errors in future in-

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[1] See Appendix A giving the proof, at pages A-6, A-11, A-12, A-17, A-19, A-20, A-22.

volving appellate review of special findings by triers of facts.

Summary.

Petitioners submit that:

1. No citizen of the United States of America without Due Process of Law can be deprived by a State of his rights to life, liberty and property so long as the Supreme Court of the United States has and exercises judicial power to protect such Constitutional rights.

2. But the Petitioners, without a trial and findings by the Chancellor on their defenses, and hence without Due Process of Law, have been deprived of their rights to liberty of contract and to property by a final judgment of the State Supreme Court.

3. Because of this deprivation of Petitioners' constitutional rights, the Supreme Court of the United States ought to reverse the State judgment and, summarily or after argument, ought to issue its order that the Petitioners be given a trial of their defensive issues before their liberty of contract is impaired or their property is taken away from them.

The foregoing summary of argument is supported by the following detailed argument.

Judicial Power of Supreme Court of the United States.

The Supreme Court of the United States of America has jurisdiction in cases arising under the Constitution of the United States and has exercised it to protect individual liberty and valuable property rights against violation contrary to Due Process of Law. *Sam Thompson v. City of Louisville*, (1960) No. 59, 4 L. Ed.2d 654; *Frank v. Mangum*, 237 U.S. 309, 331 (1915); *United Gas Pub. Ser. Co. v. Texas*, 303 U.S. 123, 143 (1938).

Fundamental rights of necessity imply a remedy; *ubi jus, ibi remedium*, where there is a right, there a remedy exists also; and the Supreme Court of the United States is the protector of fundamental rights of citizens of the United States. Cf. *Texas & Pacific R. Co.* v. *Rigsby*, 241 U.S. 39-40 (1916), citing 1 Co. Dig., Action upon Statute (1915).

Procedural Due Process.

The present case presents denial of the fundamental right to a hearing of defenses with an opportunity to introduce evidence and to have a decision by the Trier of Fact, the Chancellor. This right is procedural Due Process. It is recognized in *Saunders* v. *Shaw*, 244 U.S. 317, per Holmes, J.

Saunders v. *Shaw*.

In *Saunders* v. *Shaw* and *Board of Drainage Commissioners*, 244 U.S. 317, per Holmes, J. (1917), an action for an injunction was brought by a taxpayer against collection of a drainage tax, and he offered to show his land was an island outside the drainage district and received no benefit. Defendant's objection to the evidence as inadmissible on the pleadings was sustained. The defendant offered evidence to show the land was not an island, in the Gulf of Mexico, but the plaintiff was not permitted to cross-question the witness, because the question was not open. Judgment for the defendant was affirmed at first on appeal, but on rehearing was reversed, and it was held that the land was low, marshy, and was not benefited; and the injunction was granted. An intervening defendant, a bondholder, applied for a second rehearing, but was denied under a rule permitting only one rehearing; and this defendant appealed to the United States Supreme Court as plaintiff in error.

It was held: "He now brings this writ of error and says that he has been deprived of due process of law contrary to the Fourteenth Amendment, because the case has been decided against him without his ever having had the proper opportunity to present his evidence. Technically this is true, for when the trial court ruled that it was not open to the plaintiff to show that his land was not benefited, the defendant was not bound to go on and offer evidence that he contended was inadmissible in accordance with his view." "Probably the majority of the Supreme Court thought that it was so plain on the uncontroverted facts that the case was within the principle of the *Myles Salt Co Case*, that to remand it would be an empty form,—a mere concession to technicality. It may turn out so, but we do not see in the record an absolute warrant for the assumption, and therefore cannot be sure that the defendant's rights are protected without giving him a chance to put his evidence in." Hence, the decision was reversed.

Kelley v. *Everglades Drainage District*.

Likewise, in *Kelley* v. *Everglades Drainage District*, 319 U.S. 415, per Curiam (1943), it was held that certiorari should be granted, a judgment vacated, and the case should be summarily remanded for findings of fact required by statute as basis of a judgment in approving a plan for composition of debts (under Sec. 83(e) of the Bankruptcy Act, and Rule 52(a), Rules of Civil Procedure, and General Order in Bankruptcy, No. 37, requiring the court to find the facts specially) because the record lacked the findings of fact required by the statute and the General Orders in Bankruptcy. "We hold only that there must be findings, stated either in the court's opinion or separately, which are sufficient to indicate the factual basis for the ultimate conclusion." "To support such determinations,

there must be findings, in such detail and exactness as the nature of the case permits, of subsidiary facts on which the ultimate conclusion of fairness can rationally be predicated." *Ib.*, p. 420.

In accord: *Consolidated Rock Prod. Co.* v. *DuBois*, 312 U.S. 510, 520-525 (1941); *Wilson Cypress Co.* v. *Del Pozo*, 236 U.S. 635, 657 (1915). Cf. *Graver Mfg. Co.* v. *Linde*, 336 U.S. 271, 274 (1949) findings of fact shall not be set aside unless clearly erroneous.

Mississippi Chancery and Appellate Jurisdiction.

The fundamental right to a trial and findings on defenses in Chancery is recognized in Mississippi. It is held that the defenses made in equity, on which request for special findings of fact and conclusions of law is made, must be tried by the Chancellor under Section 1390, Mississippi Code, 1942, and that the Mississippi Supreme Court has no power to try such issues when pretermitted by the Chancellor. This is the express decision of the present Chief Justice of the Supreme Court of Mississippi in the case of *Southern Package Co.* v. *Beall*, 180 So. 789, 181 Miss. 740 (1938). Petitioners had and have no opportunity to argue the denial of their motion for new trial, which motion lies as a matter of course, and as to which the Petitioners are taken by surprise, by the summary order of May 2, 1960. Other Mississippi cases in accord with the *Southern Package Co.* case, *supra*, are: *Bullard* v. *Citizens National Bank*, 160 So. 280, S. Ct. Miss. (1935); *Pittman* v. *Martin*, 43 So. 668, S. Ct. Miss. (1949); and *Owen* v. *Owen*, 88 So.2d 100, S. Ct. Miss. (1956). These cases were decided under the statute (Section 1390) requiring special findings and mark the significant and important departure from proceedings which are not governed by this statute but on which a general decree is not

based on special findings but is rendered without special findings and on the record as a whole, and so are less susceptible of review. Cf. *Yazoo etc. R. v. Adams*, 32 So. 937, 942-944, 81 Miss. 90 (1902).

It was held in *State Highway Commission* v. *Coahoma County*, 32 So.2d 555, 565 (1947), S. Ct. Miss., per Griffith, J., "The Supreme Court has appellate jurisdiction only, and is not authorized to piece out a decree by making findings of facts." In accord: Cf. *White* v. *State*, 131 So. 96, 159 Miss. 207 (1930); and concurring opinion in *In re Steen*, 134 So. 67, 72 (1931), on lack of power of Mississippi Supreme Court to try issues or cases *de novo*, and restricting its power to that of review of records of trial courts, with certain unusual exceptions, of which the present case is not one.

Denial of Procedural Due Process in Present Case.

On the pleadings and evidence offered by the Petitioners the issue is made that the status of the letter of March 2, 1957, as to terms of the proposed sale, is not that of a contract document, and that the series of letters written by Petitioners from March 2 through March 5 is not a contract document, because no contractual intent existed or was shown; and no final or definitive offer was made until Petitioners submitted their draft of an "Agreement and Warranty Deed Covering Land" on April 13, 1957; but the Respondent rejected this, the only complete and final offer the Petitioners ever made. This is Petitioners' defense summarized as No. 1, page 19 hereof.

The Chancellor as the Trier of Fact has not made a record on but has excluded the evidence and has not decided this issue of fact; the State Supreme Court has no power under the State Constitution to try this issue *de*

novo, especially on a record from which Petitioners' evidence in support of the issue had been excluded by the Chancellor, in his discretion, as shown in his opinion, and also at trial, to avoid "encumbering" the record,[1] and also on the mistaken idea the parol evidence rule applied.[1] The issue was contractual intent to create and establish a contract, not interpretation of an established contract to which the parol evidence rule applies. For the State Supreme Court thus to deny Petitioners' right to remand for a trial of this issue by the Chancellor and for the State Supreme Court to try it *de novo* is a denial of procedural Due Process, especially on an erroneous and limited record *Georgia R. J. Elec. Co.* v. *Decatur*, 295 U.S. 165, 171 (1935).

Constitutional Question Raised Promptly by Petitioners.

At once, when their basic rights to Due Process were denied thus by the shift of ground of decision made by the State Supreme Court and by denial of new trial on the defenses of the answer, the Petitioners filed a Suggestion-of-Error invoking substantive Due Process under the Federal Constitution against denial of liberty of contract and property, arbitrarily and without justifying evidence. At the same time, by Implementing Motions to cure denial of Due Process, Petitioners moved the Court to grant a new trial on the defensive issues, which the Chancellor had pretermitted, thereby asking for a trial thereon with opportunity to introduce evidence, to which they were entitled under procedural Due Process. This motion was denied without opinion. On denial of this motion implementing substantive Due Process, at the same term and before mandate issued, the Petitioners gave notice of denial of said Due Process rights, citing *Southern Package Co.* v. *Beall* and *Saunders* v. *Shaw*, and moved the

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1. R. 324. See pp. A-6-7 below.

Court to stay its mandate pending appeal to this Court by petition for certiorari to request remand for trial of the defenses of the answer, notifying the Court, further, that the case was one in which only on its own motion might relief be given in said Court, under Rule 14(3) of the Court, cutting off the right to argue after suggestion-of-error. On June 28, 1960, Petitioners moved for reargument, as stated on page 34 above citing *Saunders* v. *Shaw*, etc.

The test of the sufficiency by suggestion-of-error, implementing motions, and notice of denial of Due Process thus given by Petitioners, in the particulars specified, is given in an opinion by Mr. Justice Story, in *Crowell* v. *Randell*, 35 U.S. 367, 397 (1836), that it is sufficient if it is clear that the question was made and that the court below must have decided the question in order to come to a decision, but it is not indispensable that the question was made and a decision given by the court below on the very point, in *totidem verbis*, by direct and positive statement. See also *Grannis* v. *Ordean*, 234 U.S. 385, 392 (1914).

The foregoing is believed to be all that Petitioners reasonably may be required to do in giving notice to the appellate court which has taken Petitioners by surprise at the last phase in denying a motion which lies of course for new trial on untried defensive issues. In similar case, *Saunders* v. *Shaw*, *supra*, held: "The record discloses the facts but does not disclose the claim of right under the Fourteenth Amendment until the assignment of errors filed the day before the Chief Justice of the State granted this writ. Of course ordinarily that would not be enough. But when the act complained of is the act of the Supreme Court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap

in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here. The defendant was not bound to contemplate a decision of the case before his evidence was heard and therefore was not bound to ask a ruling or to take other precautions in advance. * * * It appears that shortly after the Supreme Court had declined to entertain the petition for rehearing the plaintiff in error brought the claim of constitutional right to the attention of the Chief Justice of the State by his assignment of errors. We do not see what more he could have done."

Summary Remand.

For denial of the elementary Due Process right to a trial of defensive issues not tried, found or disposed of, a new trial *de novo* should be given Petitioners, under the principles of *Saunders* v. *Shaw*, *Kelley* v. *Everglades Drainage District*, decided in this Court, and of *Southern Package Co.* v. *Beall*, and other cases decided in the Mississippi Court. Cases approving certiorari and summary remand are: *Kelley* v. *Everglades Drainage District*, *supra*; *Ewing* v. *Gardner*, 341 U.S. 321 (1951), *McDaniel* v. *The Lisholt*, 359 U.S. 26 (1959); *Securities & Exchange Com'n* v. *Otis & Co.*, 338 U.S. 843 (1949).

Denial of Substantive Due Process.

The present case presents a denial of fundamental rights of liberty and property in consequence of arbitrary findings unsupported by evidence, that the Petitioners made an unconditional offer to sell the land. Petitioners made express written conditions (p. 26, above), which the State Supreme Court has nullified (R. 432, p. A-14 below). Thus Petitioners have been stripped of liberty to make contracts only on conditions voluntarily agreed to by

them, there being no question involved of any State statute regulating the power of contracting and bargaining, as in the classic cases defining the orbit of the right of the individual to contract. *Allgeyer* v. *Louisiana*, 165 U.S. 578 (1897); *Coppage* v. *Kansas*, 236 U.S. 1, 14 (1915); *Meyer* v. *Nebraska*, 262 U.S. 390 (1923); *Adair* v. *United States*, 208 U.S. 161, 172, 173 (1908) quoting *Cooley* on "Torts", page 278, on liberty of declining to contract; *Texas N.O.R. Co.* v. *Railway Clerks*, 281 U.S. 548, 570 (1930); *National Labor Relations Board* v. *Jones & Laughlin*, 301 U.S. 1, 33 (1936); *Phelps Dodge* v. *Labor Board*, 313 U.S. 177, 187 (1941); *III Pound*, "Jurisprudence", 156, note 4, 159.

Hardship of Respondent's Actions.

Petitioners are made liable for heavy damages for a long delay caused solely by Respondent in delaying assertion of any claim while he reopened litigation, and then reasserting his claim after losing the suit in which he attacked title of one of the Petitioners although Petitioners really have no contract with the Respondent. The record shows that the Respondent has been in possession of this land for 1956 and 1957 without paying the rent balance notes due thereon. He was in possession in 1958 and paid no rent. He has burdened the Petitioners with litigation for over five years, and has not sustained a single claim until the present decision of April 4 and May 2, 1960, which is a miscarriage, contrary to elementai Due Process, but subject to correction in this Court.

Repudiation Found Arbitrarily.

The case also involves an arbitrary finding of repudiation by Petitioners of an agreement, attacking the reputation of the Petitioners, one of whom is an attorney, and all of whom are entitled to fair treatment after their day

in court on their pleaded defenses. Cf. *Perry* v. *United States*, 294 U.S. 330, 351 (1935), on reproach of "repudiation"; and *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 247 (1957), on value of professional reputation, as an interest and right within the protection of the Due Process Clause.

Nullification of Note Provisions Is Judicial Abrogation of Obligation of Contracts, Against Due Process on Property, or Against Article I, Section 10, Constitution, on Contracts.

The nullification of the interest and the attorney fee clauses of the said notes denies property without Due Process, and abrogates the obligation of contracts. Cf. *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), and Edwin S. Corwin, "Constitution," annotated, p. 332 (1952), Art. I, Sec. 10, Constitution, and analysis in discussion R. 481 Suggestion-of-Error.

General Importance of the Present Case As a Precedent.

A Chancellor may omit making a required finding on a good defense pleaded provided he gives a decision on another ground for the pleader. An appellate court that reverses the Chancellor on his ground of decision is required by Due Process to give the pleader the benefit of his good defense pleaded, by remanding the case for trial thereon. *Saunders* v. *Shaw* held that a shift by an appellate court of the ground of excluding evidence and a decision of the issue concerned denies Due Process. *Kelley* v. *Everglades Drainage District* holds invalid a decree not based on required findings. The present case involves the principles of these two cases in a matter involving pleading operative facts and requesting special findings thereon in chancery, discretionary exclusion of defensive issues, exclusion of defensive evidence and a decree for the defendants Petitioners here. This was followed by

shift of ground of decision in an appellate court, and d
nial of a trial on the defensive issues. Clarification of t
requirements of Due Process might be promoted by a d
tailed examination of this case (Cf. *Dalehite* v. *Unit*
States, 346 U.S. 15, 24, Note 8) though decision may
rested summarily on *Saunders* v. *Shaw* and *Kelley* v. *Eve*
ridge Drainage District.

RESUME.

The present case was reviewed by the State Supren
Court on a record restricted in two ways: (1) Petitioner
testimonial and documentary evidence had been exclude
but the decree in favor of the Petitioners made the erro
harmless and cut off any right to object to error in excl
sion of evidence of no contractual intent in the detache
letter of March 2 relied on by Respondent, and of Respon
ent's inequitable deception of Petitioners in ostensibl
agreeing to stop a lawsuit attacking the land title; and (2
requested findings of fact on Petitioners' defenses wer
omitted by the Chancellor although the statute require
finding.

Then on this restricted record the State Supren
Court reversed the Chancellor made findings of fact n
more adverse to the Petitioners on the pleaded fact issue
directed a decree for the Respondent and denied Petitioner
Suggestion-of-Error and Implementing Motions, and m
tions for reargument asserting their Due Process right t
liberty of contract and to a remand for trial to cure de
nial of Due Process. In thus finding facts de novo the Stat
Supreme Court negligently exceeded its power and fail
fell as an appellate court under the State Constitution
[illegible] the Petitioners' [illegible] property
and also by this one-sided procedure [illegible]

record the said Court violated the requirement of fundamental fairness of Due Process, in a situation parallel to that of *Saunders* v. *Shaw*, and violated liberty of contract and property rights.

PRAYER FOR DUE PROCESS OF LAW.

Due Process of law in *principle* bars the State acting through its Supreme Court from taking away the Petitioners' liberty of contract and valuable property without a just trial of this case. The Petitioners pray the Supreme Court of the United States, by grant of certiorari and appropriate orders, to extend to them the *actual* protection of Due Process of Law under the Constitution of the United States as the supreme Law of the Land binding the Judges in each State.

Respectfully submitted,

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